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Nos. 95-466, 95-801 and 95-6433

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN BENNETT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

MARIA CECILIA BARONA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

MICHAEL DUBARRY MCCARVER, AKA MIKE BALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether electronic surveillance of an American citizen traveling abroad that was jointly undertaken by American and foreign law enforcement authorities and that fully complied with the requirements of foreign law violated the Fourth Amendment.

2. Whether the Fourth Amendment applies to electronic surveillance of a resident alien in a foreign country, jointly undertaken by American and foreign law enforcement authorities.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-466

BRIAN BENNETT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 95-801

MARIA CECILIA BARONA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 95-6433

MICHAEL DUBARRY MCCARVER, AKA MIKE BALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a)[1] is reported at 56 F.3d 1087. A related opinion of

[1] "Pet. App." refers to the appendix to the petition in No. 95-466.

the court of appeals (Pet. App. 50a-85a) is unreported, but the judgment is noted at 59 F.3d 176 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1995. Petitions for rehearing were denied on July 18, 1995. Pet. App. 86a-88a. The petition for a writ of certiorari in No. 95-466 (Bennett Pet.) was filed on September 18, 1995. On October 10, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari in No. 95-801 to and including November 15, 1995, and the petition (Barona Pet.) was filed on that date. The petition for a writ of certiorari in No. 95-6433 (McCarver Pet.) was filed on October 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioners were each convicted of conspiring to possess cocaine with intent to distribute it (Count 1), in violation of 21 U.S.C. 846. Petitioners Bennett, Barona, and Villabona-Alvarado (Villabona) were also convicted on four counts of possessing cocaine with intent to distribute it (Counts 2-5), in violation of 21 U.S.C. 841(a)(1); petitioners Harris, Martinez, and McCarver were convicted on three counts of possessing cocaine with intent to distribute it (Counts 2-4), in violation of 21 U.S.C. 841(a)(1). In addition, Bennett was convicted on two counts of structuring financial transactions to avoid reporting requirements (Counts 12, 17), in violation of 31 U.S.C. 5324; and one count of engaging in a continuing criminal enterprise (CCE) (Count 28), in violation of 21 U.S.C. 848. Villabona was also convicted on ten counts of

money laundering (Counts 7-8, 19-26), in violation of 18 U.S.C. 1956(a)(1); five counts of structuring financial transactions to avoid reporting requirements (Counts 12-16), in violation of 31 U.S.C. 5324; and one count of engaging in a CCE (Count 27), in violation of 21 U.S.C. 848. Bennett was sentenced to life imprisonment and fined $250,000. Harris was sentenced to 235 months' imprisonment, to be followed by five years' supervised release, and fined $80,000. Barona was sentenced to 235 months' imprisonment, to be followed by five years' supervised release, and fined $250,000. Martinez was sentenced to 235 months' imprisonment, to be followed by five years' supervised release, and fined $200,000. Villabona was sentenced to life imprisonment and fined $475,000. McCarver was sentenced to 240 months' imprisonment, to be followed by five years' supervised release, and fined $80,000.

1. During 1987 and 1988, petitioners Bennett and Villabona organized and supervised a criminal enterprise that obtained more than 3,000 kilograms of cocaine from suppliers in Colombia. Petitioners Barona and Martinez delivered the cocaine to petitioners Harris and McCarver and other individuals in Los Angeles, California, for further distribution in the United States. Pet. App. 6a-8a; Gov't C.A. Br. 4-16.[2]

2. At trial, the government introduced into evidence tapes of narcotics-related telephone conversations involving petitioners and other co-conspirators. The conversations had been monitored and inter-

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[2] "Gov't C.A. Br." refers to the brief filed by the United States in the court of appeals in connection with the appeal filed by petitioners Bennett and Harris.

cepted by Danish and Italian law enforcement authorities.

a. In December 1987, petitioners Bennett and Villabona traveled to Copenhagen, Denmark, and registered at the Savoy Hotel. Between December 4 and 7, the Danish police wiretapped the hotel telephone lines and installed an electronic listening device in Villabona's room. Pet. App. 7a, 20a-21a; Gov't C.A. Br. 6-8.

b. On December 7, 1987, petitioner Villabona and his wife, Helle Nielsen, and petitioner Bennett traveled to Aalborg, Denmark, and stayed with Nielsen's parents. Between December 7 and 9, the Danish police wiretapped the telephone line at Nielsen's parents' residence. After Villabona was observed making calls from a public telephone, the Danish police also wiretapped that telephone line. Pet. App. 7a, 21a-22a; Gov't C.A. Br. 8.

c. On December 8, 1987, petitioners Bennett and Villabona returned to Copenhagen and stayed at the Hotel Sara-Dan. On December 8 and 9, the Danish police wiretapped the hotel's telephone line. Pet. App. 7a, 22a; Gov't C.A. Br. 8-9.

d. On December 9, 1987, petitioners Bennett and Villabona flew from Copenhagen to Milan, Italy, where they registered at the Hilton International Hotel. The Italian police wiretapped the telephone line of their room. Pet. App. 7a, 23a; Gov't C.A. Br. 9-11.

e. In late March 1988, petitioner Villabona and Nielsen returned to Aalborg, where they again stayed with Nielsen's parents. Between March 28 and April 16, the Danish police wiretapped the telephone lines of Nielsen's parents' residence and the public telephone in Aalborg. Pet. App. 7a, 22a-23a; Gov't C.A. Br. 11-13.

2. Before trial, petitioners moved unsuccessfully to suppress the tapes of the telephone conversations intercepted by the Danish and Italian authorities. Pet. App. 8a-9a, 89a-90a. The district court ruled that the Fourth Amendment did not apply to the Italian wiretap, because the Italian police did not conduct the wiretap as part of a "joint venture" with American authorities. *Id.* at 8a. Although the court found that the Danish police were engaged in a "joint venture" with American DEA agents, *ibid.*, the court concluded that the Danish wiretaps did not violate the Fourth Amendment, because (i) "the order issued by the Danish Court was lawful and in accordance with their law" and (ii) "the United States authorities reasonably relied upon the representations of the Danish officials with respect to the wiretaps, and therefore they were acting * * * in good faith," *id.* at 8a-9a, 90a.

3. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-49a.[3] The court rejected petitioners' claim that the United States' participation in the Danish and Italian wiretaps violated the Fourth Amendment. *Id.* at 8a-24a. The court observed, initially, that "[i]t [wa]s not clear * * * that Villabona or the other non-citizen

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[3] The court reversed the CCE convictions of petitioners Bennett (Count 28) and Villabona (Count 27) and remanded for resentencing, because it concluded that the jury had been improperly instructed on one of the elements of that offense. Pet. App. 24a-29a. In a separate unpublished opinion, the court also reversed certain of the illegal structuring convictions of Bennett (Counts 12, 17) and Villabona (Counts 12-16), on the ground that the jury had been improperly instructed on one of the elements of the offense. *Id.* at 66a. The court rejected petitioners' other claims of error. *Id.* at 50a-85a.

defendants * * * [we]re entitled to receive any Fourth Amendment protection whatsoever," particularly "in the context of an *extraterritorial* search." *Id.* at 18a (citing *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990)). The court believed that it "could hold * * * that Barona, Martinez, and Villabona ha[d] failed to demonstrate that, at the time of the extraterritorial search, they were 'People of the United States' entitled to receive the 'full panoply of rights guaranteed by our Constitution.'" Pet. App. 18a (quoting *United States* v. *Verdugo-Urquidez*, 856 F.2d 1214, 1236 (9th Cir. 1988) (Wallace, C.J., dissenting), rev'd, 494 U.S. 259 (1990)). It "cho[se], however, not to reach the question because even if [the non-citizen defendants] were entitled to invoke the Fourth Amendment, their effort would be unsuccessful." Pet. App. 18a.

Relying principally on the Ninth Circuit's earlier decision in *United States* v. *Peterson*, 812 F.2d 486, 490 (1987) (Kennedy, J.), the court held that the involvement of American law enforcement authorities in the Danish and Italian wiretaps did not violate the Fourth Amendment. Pet. App. 8a-24a. The court observed that "[n]either our Fourth Amendment nor the judicially created exclusionary rule applies to acts of foreign officials" (*id.* at 9a (quoting *United States* v. *LaChapelle*, 869 F.2d 488, 489 (9th Cir. 1989))) unless (1) "the circumstances of the foreign search and seizure are so extreme that they 'shock the [judicial] conscience,' [so that] a federal appellate court in the exercise of its supervisory powers can require exclusion of the evidence," or (2) "United States agents' participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials" (Pet. App.

10a (quoting *Peterson*, 812 F.2d at 490)). "If a joint venture is found to have existed," the court explained, "the law of the foreign country must be consulted at the outset as part of the determination whether or not the search was reasonable." Pet. App. 10a (quoting *Peterson*, 812 F.2d at 490). So long as a foreign search complies with applicable foreign law, the court held, the search is reasonable under the Fourth Amendment. Pet. App. 10a n.1.[4]

The court of appeals concluded that "the district court did not clearly err in finding that the four Danish wiretaps at issue were 'joint ventures.'" Pet. App. 18a. And, after concluding that each of those wiretaps complied with the requirements of Danish law, *id.* at 19a-23a, the court agreed that the United

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[4] In *Peterson*, DEA agents had participated with Philippine authorities in wiretapping the telephone line of an apartment in Manila that was rented by one of the defendants. 812 F.2d at 488-489. Writing for the court, then-Judge Kennedy explained that, if "United States agents' participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials, the law of the foreign country must be consulted at the outset as part of the determination whether or not the search was reasonable." *Id.* at 490. After concluding that the wiretapping operation at issue was a joint venture, the court assumed, for purposes of analysis, "that the search did not comply with Philippine law and was, as a result, not reasonable under the fourth amendment," *id.* at 491, but held that the evidence was nonetheless admissible under the good-faith exception to the exclusionary rule, because the United States agents had reasonably relied on the representations of the Philippines' authorities that the wiretap complied with Philippine law. *Id.* at 491-492. See also *United States* v. *Juda*, 46 F.3d 961, 968 (9th Cir.) ("In *Peterson*, we held that a foreign search is reasonable if it conforms to the requirements of foreign law."), cert. denied, 115 S. Ct. 1811, 2632 (1995).

States' participation in the wiretaps did not violate the Fourth Amendment, *id.* at 24a.

The court also concluded that the district court did not clearly err when it found that the Italian wiretap had not been undertaken as part of a joint investigation. Pet. App. 23a. "Because th[at] wiretap was conducted by foreign officials without substantial United States involvement," the court explained, "Fourth Amendment principles do not apply." *Id.* at 23a-24a.

Judge Reinhardt dissented in part. Pet. App. 30a-49a. In his view, a search of an American citizen abroad by foreign authorities, at the behest and for the benefit of United States authorities, that fully complies with the requirements of foreign law is an unreasonable search under the Fourth Amendment unless supported by probable cause. *Id.* at 31a-42a. Judge Reinhardt found the majority's reliance on *Peterson* misplaced, because "*Peterson* never discusse[d] the critical question of whether American officials must have *probable cause* for inducing a foreign government to carry out a search." *Id.* at 43a. He would have relied, instead, on the court of appeals' reasoning in *Verdugo-Urquidez*, in which the court had held that probable cause was required for a foreign search of a nonresident alien. *Id.* at 44a-47a. Judge Reinhardt recognized that this Court reversed the court of appeals' decision in that case, but in his view this Court "left the part of the *Verdugo* analysis relevant to this case undisturbed." *Id.* at 45a.

ARGUMENT

1. Petitioners contend (Bennett Pet. 4-8, 11-13; Barona Pet. 11-18; McCarver Pet. 6) that the tapes of the telephone conversations obtained through the

Danish wiretaps should not have been admitted at trial, because (in petitioners' view) the United States' participation in the Danish wiretaps violated the Fourth Amendment. Relying largely on Judge Reinhardt's dissenting opinion, petitioners argue (Bennett Pet. 12-13; Barona Pet. 15-18) that a foreign search of an American citizen must both comply with the requirements of foreign law and be supported by probable cause.[5] Neither this Court nor any court of appeals has embraced that view.

a. The Fourth Amendment generally requires that United States law enforcement officials obtain a warrant based on probable cause before conducting a search to discover evidence of criminal wrongdoing. *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989); *United States* v. *United States District Court*, 407 U.S. 297, 315 (1972). Probable cause is also generally required in circumstances where no warrant is necessary. See, *e.g.*, *Vale* v. *Louisiana*, 399 U.S. 30 (1970) (warrantless search of home); *Chambers* v. *Maroney*, 399 U.S. 42 (1970) (warrantless search of vehicle). But, as this Court has repeatedly observed, "the special content and incidents of [the right to be free from unreasonable searches and seizures] must be shaped by the context in which it is asserted," *Wyman* v. *James*, 400 U.S. 309, 318 (1971) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 9

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[5] Although petitioners Bennett and Harris generally assert (Bennett Pet. 4) that "serious questions existed and still exist as to the orders' validity under Danish law," they do not specify how any of the wiretaps failed to comply with the requirements of Danish law. In any event, both the district court and the court of appeals concluded that the wiretaps were valid under Danish law; petitioners' fact-bound claim to the contrary does not warrant this Court's review.

(1968)), and "[a] search unsupported by probable cause can be constitutional * * * 'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable,'" *Vernonia School District 47J* v. *Acton*, 115 S. Ct. 2386, 2391 (1995) (quoting *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987)).

"Special needs" exist in the context of a foreign search. As this Court has recognized, "[f]or better or for worse, we live in a world of nation-states in which our Government must be able to 'functio[n] effectively in the company of sovereign nations.' Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (citation omitted). Foreign authorities operating within their own countries may not be willing to forgo a search that can be validly conducted under their law until American authorities are satisfied that probable cause exists. And American officials seeking to enlist the cooperation of foreign authorities in conducting a foreign search cannot insist that the foreign legal system conduct itself in accordance with domestic standards. Rather, as then-Judge Kennedy recognized in *United States* v. *Peterson*, 812 F.2d 486 (9th Cir. 1987), a foreign "joint venture" search of an American citizen that conforms to the requirements of foreign law should be accepted as reasonable within the meaning of the Fourth Amendment. *Id.* at 491; cf. *Verdugo-Urquidez*, 494 U.S. at 279 (Stevens, J., concurring in the judgment) (agreeing that "search conducted by the United States agents with the approval and cooperation of the Mexican authorities was not 'unreasonable'").

In the context of domestic searches, this Court has recognized that the reasonableness of expectations of privacy is grounded in "our *societal* understanding that certain areas deserve the most scrupulous protection from government invasion." *California* v. *Greenwood*, 486 U.S. 35, 43 (1988) (quoting *Oliver* v. *United States*, 466 U.S. 170, 178 (1984)) (emphasis added in *Greenwood*); see also *United States* v. *Jacobsen*, 466 U.S. 109, 122 (1984); *Rakas* v. *Illinois*, 439 U.S. 128, 143 n.12 (1978); *Katz* v. *United States*, 389 U.S. 347, 360-362 (1967) (Harlan, J., concurring). The legitimacy of expectations of privacy in a foreign country should similarly be judged by the societal understandings prevailing in that country. See *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring) (noting the relevance of "differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad"). As one commentator has observed: "A country's law provides the surest source for ascertaining its societal norms of privacy. The law of a foreign country, then, should determine the reasonableness of an expectation of privacy within that country." Note, *The Extraterritorial Applicability of the Fourth Amendment*, 102 Harv. L. Rev. 1672, 1687 (1989) (footnote omitted). An American citizen in a foreign country cannot, therefore, legitimately claim any greater expectation of privacy with respect to searches by that country's authorities than that recognized by the country's laws. Moreover, the American citizen cannot legitimately claim an expectation of privacy as against domestic law enforcement officers acting in concert with foreign authorities that he did not possess as against the foreign authorities acting alone. Cf. *California* v. *Greenwood*, 486 U.S. at 40-41; *California* v.

Ciraolo, 476 U.S. 207, 213-214 & n.2 (1986). Hence, a search conducted by foreign law enforcement officials and American agents abroad in compliance with the requirements applicable to the foreign officials does not violate the American citizen's reasonable expectation of privacy.[6]

b. Contrary to the contentions of petitioners Bennett and Harris (Pet. 5-6), the court of appeals' decision in this case does not conflict with this Court's decision in *Reid* v. *Covert*, 354 U.S. 1 (1957). That case held only "that United States citizens stationed abroad could invoke the protection of the Fifth and Sixth Amendments." *Verdugo-Urquidez*, 494 U.S. at 259. In this case, the court of appeals acknowledged that the Fourth Amendment applies to "joint venture" searches of American citizens abroad.

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[6] Petitioners' alternative claim (McCarver Pet. 6; Barona Pet. 17-18) that the foreign surveillance undertaken in this case was conducted abroad purposefully to evade the need to establish probable cause is equally without merit. Even if the surveillance of petitioners Bennett and Villabona had been conducted abroad for that purpose—and petitioners provide no support whatever for that allegation—this Court has never suggested that a lawful search is invalid because of the motives of the law enforcement officers, see *Horton* v. *California*, 496 U.S. 128, 138 (1990), or that a lawful search would be invalid if a court thought it were undertaken to circumvent otherwise applicable restrictions. For example, an officer may not generally make a warrantless arrest of an individual in his home, but nothing prevents the officer from avoiding the warrant requirement by waiting to make the arrest when the individual steps outside. *Byars* v. *United States*, 273 U.S. 28 (1927), does not assist petitioners. *Byars* held only that, in a joint operation by state and federal officers, the United States may not "avail itself of evidence *improperly* seized by [the] state officers." *Id.* at 33 (emphasis added).

It concluded, however, that the searches at issue complied with the Fourth Amendment.

c. As Judge Reinhardt noted below (Pet. App. 44a-45a), the Ninth Circuit held in *United States* v. *Verdugo-Urquidez*, 856 F.2d 1214, 1228-1230 (1988), rev'd, 494 U.S. 259 (1990), that the Fourth Amendment requires American agents to obtain a warrant based on probable cause in order to conduct a foreign search of a foreign national. This Court categorically rejected the court of appeals' reasoning in that case, and held that the Fourth Amendment does not apply to a foreign search of a foreign national. *Verdugo-Urquidez*, 494 U.S. at 274-275. Although this Court had no occasion in *Verdugo-Urquidez* to decide whether a foreign search of an American citizen must be supported by probable cause, the Court cast a skeptical eye on the proposition. *Id.* at 274 (noting that court of appeals' "global view" of the Fourth Amendment—including the court of appeals' holding that "American agents would have to articulate specific facts giving them probable cause to undertake a [foreign] search or seizure"—would "plunge [the Executive and Legislative Branches] into a sea of uncertainty"). In any event, the existence *vel non* of an intra-circuit conflict between whatever remains of *Verdugo-Urquidez* and the decision of the panel in this case is a matter for the Ninth Circuit to resolve, and does not warrant review by this Court.

2. There is no merit to the claim (Bennett Pet. 8-11) that the court of appeals' decision "runs afoul" of 50 U.S.C. 401 and "contravenes" Executive Order No. 12,333, 46 Fed. Reg. 59,941 (1981). That statute and executive order address only the manner in which intelligence activities relating to national security and foreign policy may be conducted by certain de-

partments and agencies of the government. Indeed, Section 2.2 of Executive Order No. 12,333 states that "[n]othing in this Order shall be construed to apply to or interfere with any authorized civil or criminal law enforcement responsibility of any department or agency."

Nor is there any merit to the related claim (Bennett Pet. 10-11, 14) that Congress's failure to provide limitations applicable to law enforcement searches overseas similar to those applicable to overseas intelligence activities deprives American citizens who are subject to overseas law enforcement searches of equal protection of the laws. Petitioners do not contend that the governmental policies at issue in this case distinguish among classes of American citizens.[7] Absent such discrimination, Congress may address concerns that it has with respect to particular governmental functions without addressing such concerns across the board:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which

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[7] Congress has, in fact, restricted the overseas activities of American officers or employees in the narcotics area, albeit only with respect to "arrest[s] in [a] foreign country as part of [a] foreign police action" and "interrogat[ion] or * * * presen[ce] during the interrogation of [a] United States person arrested in [a] foreign country." 22 U.S.C. 2291(c)(1) and (5). Congress's determination not to restrict the overseas activities of narcotics agents more extensively suggests that it did not find such restrictions necessary or desirable.

> seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

FCC v. *Beach Communications, Inc.*, 113 S. Ct. 2096, 2102-2103 (1993) (quoting *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955)).

In any event, petitioners did not advance any claims premised on 50 U.S.C. 401 or Executive Order No. 12,333 in the court of appeals, and those claims are not properly raised for the first time in this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

3. Finally, petitioners Barona, Martinez, and Villabona contend (Pet. 19-22) that the Court should resolve in this case the applicability of the Fourth Amendment to extraterritorial searches of resident aliens and illegal aliens who have "substantial connections" to the United States. The court of appeals did not decide that issue in this case, however.[8] Particularly in the absence of any demonstrated conflict among the lower courts, there is no warrant for this Court to address the issue in the first instance.

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[8] Although the court of appeals suggested that it could have relied on petitioners' "fail[ure] to demonstrate that, at the time of the extraterritorial search, they were 'People of the United States' " entitled to the protections of the Fourth Amendment, the court chose "not to reach th[at] question because even if they were entitled to invoke the Fourth Amendment, their effort would be unsuccessful." Pet. App. 18a.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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